

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHIRLEY GRAFF

Claimant

VS.

TRANS WORLD AIRLINES

Respondent

Self-Insured

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Docket No. 176,398

ORDER

Respondent, an authorized self-insured, appeals from an Award entered by Administrative Law Judge Robert H. Foerschler on January 8, 1998. The Appeals Board heard oral argument July 21, 1998.

APPEARANCES

Michael L. Hodges of Lenexa, Kansas, appeared on behalf of claimant. Thomas Clinkenbeard of Kansas City, Missouri, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

1. Does Kansas have jurisdiction? Claimant acknowledges her contract of employment was not entered in Kansas and her principal place of employment was not in Kansas. She, an airline hostess, claims her injury, carpal tunnel syndrome, occurred in Kansas because some of the injury was caused by work while flying over Kansas.
2. Did the finding by the ALJ, awarding claimant benefits, violate the provisions of K.S.A. 44-506 that prohibit application of the Workers Compensation Act to employers "so engaged in interstate commerce as to be not subject to the legislative power of the state"?
3. Does application of the Kansas Workers Compensation Act to claimant's injury violate provisions of the United States Constitution?

4. Is claimant entitled to work disability? Claimant retired after she was released from treatment and respondent contends the award should be limited to functional impairment on the basis of principles stated in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments by the parties, the Appeals Board concludes the Award by the ALJ should be reversed and benefits denied. The Board concludes claimant has not proven she suffered accidental injury in Kansas and the Kansas Act, therefore, does not apply. Because of the possibility this decision will be appealed, the Board has also made findings on the other issues raised.

Findings of Fact

1. Claimant worked for respondent as a flight attendant from July 1966 through November 1991.

2. The Board also finds claimant developed bilateral carpal tunnel syndrome which was caused, aggravated or accelerated by her work activities as an airline hostess, including the beverage service, handing out trays, and pushing the beverage cart. This point does not appear to be in dispute and this conclusion is supported by the testimony of Dr. Cameron D. Jones, the only physician to testify in this case.

3. Claimant alleges that during 1991 she developed carpal tunnel syndrome from her work activities and further alleges that a portion of those activities were performed while flying over Kansas. The evidence establishes that during 1991 claimant flew from St. Louis to Palm Springs, St. Louis to Salt Lake City, St. Louis to Honolulu, and St. Louis to Los Angeles and San Francisco. She also flew from Chicago to San Antonio and St. Louis to Phoenix. Because these flights follow a variety of alternate routes, any given flight may or may not cross over Kansas. As a result, claimant cannot state which flights went over Kansas, how long the flights were over Kansas, what activities she engaged in during any specific flight, or what specific activities she engaged in over Kansas. Nevertheless, the Board finds that the evidence establishes by more probably than not claimant did fly over Kansas during 1991, and did, while flying over Kansas, engage, at least some, in the type of activities which caused, aggravated, or accelerated her carpal tunnel syndrome.

4. The flights on which claimant flew did not at any time during 1991 take off from or land in Kansas. Claimant is not a resident of Kansas. Claimant's contract of employment was not entered in Kansas and claimant's principal place of employment was not in Kansas.

5. As of December 2, 1991, claimant retired from her employment with respondent. Her last day of work was November 30, 1991, the date the Board finds to be the date of accident.

6. Although claimant apparently thought the restrictions recommended by Dr. Jones would prevent her from doing her job with respondent, Dr. Jones testified he did not intend the restrictions to prevent her from returning to work. Claimant did not advise respondent she was leaving because of her injury and respondent did not, at any time, advise her she could not return to work.

7. Claimant has not looked for work since leaving her job with respondent.

Conclusions of Law

1. The Kansas Workers Compensation Act applies to injuries arising out of and in the course of employment in Kansas. K.S.A. 44-505.

2. The Board finds claimant has not proven she suffered accidental injury in Kansas. The Board does not consider the thin and uncertain connection between claimant's injuries and the state of Kansas sufficient to establish accidental injury in Kansas. K.S.A. 44-501.

3. Since the accident did not occur in Kansas, claimant's contract of employment was not in Kansas, and claimant's principal place of employment was not in Kansas, the Kansas Workers Compensation Act does not apply and benefits must be denied. K.S.A. 44-505 and K.S.A. 44-506.

4. K.S.A. 44-506 excludes activities so involved in interstate commerce as not to be subject to the legislative power of this state. This exclusion has been applied only where the federal law provides an exclusive remedy as it does in the case of railroad employees covered by the federal employer's liability act. Krous v. Lowden, 153 Kan. 181, 109 P.2d 138 (1941).

5. If the accident in this case had occurred in Kansas, Application of the Kansas Act to the injury in this case would not violate full faith and credit provisions of the United States Constitution. In support of the argument that application of the Kansas Act to the facts of this case would be unconstitutional, claimant cites several federal court decisions which consider the full faith and credit provision of the U.S. Constitution. The Board has reviewed those decisions and concludes that application of a state workers compensation act to a claim involving an injury which occurred within the state is not considered to contravene requirements of the United States Constitution. Pacific Employers Insurance Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939).

6. Even if the accident occurred in Kansas, claimant would not be entitled to a work disability and benefits would be based on the stipulated 7.5 percent functional impairment. In support of an award of work disability, the ALJ cites Brown v. City of Wichita, 17 Kan. App. 2d 72, 832 P.2d 365, *rev. denied* 251 Kan. 937 (1992). The Court of Appeals there held that retirement does not preclude an award of work disability. But the Board considers the circumstances in this case to be significantly different. Here the record does not support a conclusion that claimant could not have returned to work for respondent at a comparable

wage. Dr. Jones, one of the treating physicians, testified he did not intend for his restrictions to permanently prevent claimant from returning to her job. Claimant left employment for respondent without giving her injury as a reason. Respondent did not prevent claimant from returning to her previous work and respondent did not have an opportunity to provide accommodated work if, indeed, accommodations were required. Although retirement may not prevent an award of work disability, retirement should not be used to create a work disability. The Board, therefore, concludes claimant's award would be limited to the stipulated functional impairment of 7.5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler on January 8, 1998, should be, and is hereby, reversed and benefits denied.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The Kansas Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions. Dr. Jones related claimant's carpal tunnel syndrome condition to her work activities as an airline hostess. The record establishes that a substantial number of claimant's flights went over Kansas and that she engaged in those same work activities that caused or aggravated her condition while flying over Kansas. The airspace over Kansas is part of Kansas. It follows, therefore, that claimant's accident occurred, at least in part, in Kansas. With certain exceptions, the Kansas Workers Compensation Act generally applies to injuries occurring within this state. Granted, there are other states to which claimant's employment has greater contact, and those states may have a greater interest in this claim. But the jurisdictional test for applying the Kansas

Workers Compensation Act is not which state has the greatest interest in the claim. Instead, the test is whether claimant has proven it is more probably true than not true that she sustained injury by accident that arose out of and in the course of her employment within this state. She has proven this and the Kansas Act applies to her claim.

BOARD MEMBER

c: Michael L. Hodges, Lenexa, KS
Thomas Clinkenbeard, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director